

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of

Implementation of Section 309(j)  
of the Communications Act  
Competitive Bidding

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PP Docket No. 93-253

Petition for Reconsideration of U.S. Intelco Networks, Inc.

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## SUMMARY

USIN's primary goal is to assist the Commission's construction and implementation of a regulatory framework for competitive bidding which fulfills the Congressional mandate, and thus ensures that identified policy interests are served. USIN recognizes the substantial effort and conscientious consideration Commission staff have given the treatment of designated entities in developing competitive bidding procedures.

In this respect, USIN is particularly concerned that the Second Report & Order fails to fulfill adequately the Commission's goal of fulfilling the Congressional mandate to ensure that small business, rural telephone companies, and others are given the opportunity to participate in spectrum auctions. See, e.g., Second Report & Order, para. 230; see also 47 U.S.C. §§ 309(j)(4)(D), 309(j)(3)(B).

Specifically, USIN respectfully requests that the Commission revise the rules adopted in the Second Report & Order to permit small businesses, including rural telephone companies, to qualify for preferences even when bidding on highly competitive and capital-intensive services which may require such small businesses to aggregate resources in order to effectively compete in an auction.

Secondly, USIN respectfully requests that the Commission's definition of "rural telephone company" for the purpose of eligibility for designated entity preferences is too restrictive and will result in contravention of Congressional intent. Accordingly, USIN proposes that the Commission apply the extant definition of "small" telephone company to the current question and specify that a "rural telephone company" is one which has annual revenues of less than \$100,000,000. Alternatively, USIN suggests a threshold of 100,000 access lines.

Lastly, USIN asks that the Commission provide for equitable and comparable treatment among all small entities. Rural telephone companies, like other small businesses, play an important role in developing new services, but lack the available capital resources of large established telecommunications providers. Accordingly, Congress and the Commission recognize that the public interest would be served by granting rural telephone companies eligibility for installment payments, and other appropriate preferences, when licenses for new services are awarded via competitive bidding.

By requiring qualifying rural telephone companies to demonstrate that they are small, the FCC need not require rural telephone companies to qualify for such preferences under a separate "small business" standard. More generally, the auction rules should recognize that rural telephone companies do more than merely ensure the build out of rural areas - they represent important new entrants in wireless services markets.

Adopting these changes and clarifications will permit clear planning by such entities, and minimize obstacles which could impede small businesses, including small rural telephone companies, from attracting capital and formulating business plans. In this respect, USIN's petition is designed to assist the Commission in furthering the articulated public policy goals related to competitive bidding.

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**Petition for Reconsideration of U.S. Intelco Networks, Inc.**

U.S. Intelco Networks, Inc. ("USIN"), on its own behalf and on behalf of its Independent Telephone Company ("ITC" or "Independent") owners and users, by its attorneys and pursuant to Section 1.429 of the Commission's Rules,<sup>1</sup> respectfully seeks reconsideration of the Second Report & Order ("Order") released herein on April 20, 1994.<sup>2</sup> While the Order does, in large part, comply with Congressional directives, USIN submits that implementation of the Order's procedures will fail to fulfill the Commission's mandate to ensure that designated entities are afforded a meaningful opportunity to participate in the provision of new radio-based services. In support thereof, USIN shows the following:

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<sup>1</sup>/ 47 C.F.R. § 1.429.

<sup>2</sup> Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, Second Report & Order, released April 20, 1994; 59 Fed. Reg. 22980 (May 4, 1994) ("Order"). See Notice of Proposed Rulemaking, PP Docket 93-253, FCC 93-455, released October 12, 1993. ("NPRM").

USIN is wholly owned by 282 ITCs and provides customer database services, calling card billing validation services, 800 RESPORG services, revenue administration services and other related database services to over 1000 Independents nationwide. USIN is equally committed to assisting rural telecommunications providers in bringing new spectrum-based services to rural America. Having submitted Comments and Reply Comments in this proceeding, USIN's interest in auction design and implementation is a matter of record.<sup>3</sup>

#### **SUMMARY OF USIN'S POSITION**

USIN recognizes that efforts to implement a wholly novel method of spectrum licensing represent a significant investment of time and effort on the part of the Commission, and applauds the conscientious thought that Commission staff has given to developing appropriate treatment for designated entities. USIN strongly supports the general intent of the Order -- to provide for meaningful participation in services licensed through competitive bidding by small entities who lack the huge capital resources of large companies.

In this light, USIN believes that a conscientious reexamination of the Order will reveal that several changes are needed in order to further this intent. Specifically, USIN submits

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<sup>3/</sup> See Comments of U.S. Intelco Networks, Inc., filed herein November 10, 1993; Reply Comments of U.S. Intelco Networks, Inc., filed herein November 24, 1993.

that the Commission's Order does not fully comport with either the Commission's own identified policy interests or Congressional directives. In fact, the Order contradicts important public policy goals in several respects.

The Order's requirement that all entities, including consortia, meet the definitions for individual designated entities to receive preferences, is overbroad, discriminatory and may deter rather than encourage participation by rural telephone companies and small businesses. See Order, para. 287. USIN is particularly concerned that the FCC may foreclose opportunities for rural telephone companies to compete effectively against large deep-pocket players in auctions by denying them preferences when they choose to pool their bidding resources.

USIN submits that where bidding for capital intensive services is expected to be highly competitive, the Commission should revise its rules to recognize that meaningful participation in auctions may require such small businesses to aggregate resources via consortia or other arrangements in order to compete effectively in an auction. Specifically, USIN submits that permitting consortia controlled by designated entities to qualify for the preferences available to designated entities will in fact enhance the ability of designated entities to compete against deep-pocket players in competitive bidding proceedings, while excluding consortia may effectively foreclose any participation by smaller entities.

USIN agrees with the FCC that the definition of a "small business" may need adjustment for certain capital-intensive services. See Order, para. 271. Similarly, the definition of "rural telephone company" is unnecessarily restrictive and should be modified. The Commission itself has indicated its belief that the definition of "rural telephone company" would operate to exclude only the largest 29 telephone companies.<sup>4</sup> In fact, the definition as drawn is overly exclusive, and will operate to exclude many more companies. Given the existence of Commission-adopted definitions of "small" telephone companies which, in fact, serve rural areas, it is inappropriate and unnecessary to devise a definition which is so restrictive as to preclude and potentially distort the implementation of Congressional intent. Upon reflection on the intent of Congress and the realities of implementing this intent, USIN submits that a broader definition is more definitive.

Finally, the FCC should not require rural telephone companies, which, by definition, are "small businesses" within the industry, to qualify under a separate and unrelated standard to receive preferences directed toward small bidders, e.g., installment payments. Where rural telephone companies are defined in a manner which establishes a significant differential between these rural telephone companies and larger companies in terms of the

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<sup>4</sup>/ Statements of Robert Pepper, March 8, 1994, at news conference following the FCC meeting.

availability of capital, the FCC should make available to rural telephone companies the same mechanisms available to other smaller entities which are designed to compensate for this lack of access to capital. At a minimum, the Commission should not define small business in a manner which precludes rural telephone companies, who are in fact small, from receiving small business preferences.

## **DISCUSSION**

### **I. The Commission's Policy Goals Would Be Served By Providing Preferences to Consortia of Designated Entities in Highly Competitive Auctions for Capital-Intensive Services**

The Order adopts very restrictive rules with respect to the eligibility of a consortium or other group of designated entities to obtain preferential treatment as a "designated entity." Specifically, the FCC states that:

every entity seeking special treatment as a designated entity (whether such applicant is an individual person or a separate entity, a joint venture or consortium, an unincorporated association of entities, or a standard partnership or corporation) must certify, and be prepared to show, that it meets the definitions established for designated entities in our rules. Order, para. 287.

The Commission adopted this interpretation on the unsubstantiated presumption that voluntary associations of designated entities would dilute the opportunity for individual entities to participate. The FCC mistakenly suggests that such a policy would undermine its objective of ensuring such entities opportunities to provide spectrum-based services. Id. Unfortunately, the FCC ignores the inevitable corollary to its proposition: designated entities which are prohibited from aggregating resources may be



foreclosed from participation altogether.

This decision warrants reconsideration, as it: (1) contradicts the FCC's articulated policy goal of ensuring opportunities for designated entities in auctions for certain services and (2) is overbroad and unnecessarily limiting. For example, when combined with restrictions on installment payments, the ineligibility of consortia for preferential treatment is tantamount to a finding that, for broadband PCS, the larger spectrum blocks (which the FCC believes are needed to provide effective competition) are inappropriate for bidding by entities which may require preferential treatment to offset their lack of available capital at the initial stage of competition -- bidding in an auction. This tacit finding, and the presumptions upon which it is based, is simply wrong, and operates to favor larger entities in an impermissible manner.

The Commission's decision will operate to exclude rural telephone companies and small businesses from the very preferences designed to assist small entities. For example, in order to bid on and construct a broad-band PCS system for a particular BTA, a coalition of 10 small rural telephone companies, each serving no community of more than 10,000 in population, and each with a total of 6,000 access lines, might choose to pool resources in order to raise sufficient capital to bid and compete against multimillion dollar corporations. This entity's collective capital, both

internal and external, would still not reach the levels of that available to potential bidding competitors. However, as the resultant entity would collectively represent more than 50,000 access lines, it would not qualify as a rural telephone company, under the existing definition.<sup>5</sup> Additionally, depending on the definition adopted, such an entity might not qualify as a "small business," even though it would be quite small relative to competitors in that service.<sup>6</sup>

This result undermines the FCC's articulated policy goals. In excluding economically-viable consortia, the FCC not only fails to comply with Congressional directives to "promote economic opportunity and competition . . . by disseminating licenses among . . . small businesses, rural telephone companies, and businesses owned by members of minority groups and women,"<sup>7</sup>, but also ignores the opportunity to further its own policy goal of promoting competition among competitive entities. See Order, para. 4. Furthermore, when applied to broadband PCS or other capital-intensive services where economies are created through aggregation, the FCC's rules may steer preferences away from those designated entities who would provide service and use spectrum most efficiently. Id.

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<sup>5</sup> See 47 C.F.R. § 1.2110(3); Order, para. 282.

<sup>6</sup> See Order, para. 271.

<sup>7</sup>/ 47 U.S.C. § 309(j).

USIN submits that, for services which are recognized as highly competitive and capital-intensive, the FCC must acknowledge that collective arrangements may be necessary in order to advance participation by designated entities. Furthermore, the reality of the capital marketplace belies the FCC's ability to provide meaningful participation to consortia of telephone companies or small businesses<sup>8</sup> composed wholly of designated entities. The ability of rural telephone companies and small businesses to participate at all may well depend upon their willingness to aggregate, and/or join with deep-pocket players which assume a minority role in the consortia.

Accordingly, USIN submits that the FCC's concern that its system of preferences might be abused<sup>9</sup> by the eligibility of consortia composed of eligible and ineligible entities would best be addressed on the same basis as that under which the eligibility of businesses owned by women and minorities is judged -- ownership controlled by designated entities. The draconian alternative of ineligibility by virtue of association is neither fair nor realistic, and ignores the Congressional directive to "disseminat[e] licenses among a wide variety of applicants,

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<sup>8</sup>/ Consortia composed only partially of businesses owned by members of minority groups and women alone among the designated entities apparently will be eligible for preferential treatment. These groups are, therefore, favored above other designated entities with respect to the ability to aggregate and yet receive preferences.

<sup>9</sup>/ See Order, para. 287.

including small businesses, rural telephone companies, and businesses owned by members of minority groups and women." See 47 U.S.C. § 309(j)(3)(B).<sup>10</sup>

The FCC's policy goals would best be advanced by permitting consortia controlled by designated entities to receive designated entity preferences in services in which collective arrangements are needed to secure sufficient levels of capital, both to compete in the auction and compete in the marketplace. In such instances, opportunities for individual designated entities would not be diluted but rather enhanced, as designated entities will unlikely be able to participate effectively in auctions for highly valuable, capital-intensive services, absent collective arrangements.

As a general matter, the FCC's treatment of the consortia issue is premature and overly broad. As noted above, denying preferential status to bidding consortia may completely preclude participation by individual designated entities for some services. It is totally arbitrary to fashion rules of general applicability

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<sup>10</sup> USIN notes that proposals to allow non-controlling designated entity participation to qualify a consortia or deep-pocket player for a bidding credit may be helpful to individual designated entities, but are not a sufficient substitute for meaningful participation by designated entities in the form of mechanisms which promote actual ownership and operation of FCC-licensed services by designated entities. See Concurring Statement of Cmmr. Andrew Barrett, Third Report & Order, PP Docket 93-253 (May 10, 1994). In this regard, USIN submits that the Commission should articulate a policy that provides that specific channel blocks of spectrum will be auctioned only among individual designated entities and consortia which are controlled by designated entities. See Second Report & Order, para. 245-248.

which limit the ability of associated designated entities to obtain preferential bidding treatment for licenses in all services. The Order has, for the most part, indicated the Commission's acceptance of the wisdom of deferring development of service-specific rules. See, e.g., Order, para. 10. Given that certain services, including broadband PCS, may, as a practical matter, require designated entities to aggregate in order to obtain the necessary capital, while other services may not, it is appropriate that this issue be deferred for consideration within the context of the development of service-specific rules.

**II. The Commission's Definition of Rural Telephone Companies is Too Restrictive and Should be Modified to Incorporate Established Revenue Ceilings**

USIN submits that the Commission's definition of "rural telephone company" for the purpose of eligibility for preferences accorded designated entities is too restrictive and will result in contravention of Congressional intent. Confining the definition to companies which serve less than 50,000 access lines and which serve only areas with no place over 10,000 will improperly disqualify those companies which the Commission has already recognized to be "small." There is no justification on the record for adoption of a restrictive definition which denies the reality of the characteristics of telephone companies which provide service to rural America.

Upon reflection, USIN proposes that the Commission apply the extant definition of "small" telephone company to the current question and specify that a "rural telephone company" is one which has annual revenues of less than \$100,000,000. The underlying policy rationale for adoption of this definition is two-fold: (1) a revenue test is superior to a net worth/net profit test for an accurate assessment of the capability of a firm to bid for and construct a communications system; and (2) existing FCC rules already recognize this revenue threshold as an appropriate test for distinguishing between larger and smaller exchange carriers. See, e.g., 47 C.F.R. § 32.11(a) (accounting rules); 47 C.F.R. § 43.21 - 43.43 (annual reporting requirements for common carriers); 47 C.F.R. § 64.903 (cost allocation manuals).

In addition, USIN submits that there exist strong parallels between the total number of access lines and the rural nature of both the communities served and the telephone company providing service. Nonetheless, the Commission must avoid restrictions which artificially eliminate companies which, although "rural" by virtue of the nature of communities served, serve several rural communities in the aggregate and therefore serve a larger number of subscribers. USIN therefore proposes the following definition of "rural telephone company:"

A rural telephone company is a local exchange carrier which, together with its affiliates, serves fewer than 100,000 access lines or has gross revenues of less than \$100,000,000.

The record reflects no justification or basis for adoption of the Commission's proposed limitation and needlessly eliminates from consideration companies which serve rural areas, contrary to Congressional intent.

**III. The FCC Should Provide for Equitable Treatment of Small Rural Telephone Companies and Other Small Businesses.**

**A. The Bidding Credits Available To Rural Telephone Companies Do Not Further The Commission's Goals**

The bidding credits available to rural telephone companies, are available only to the extent that rural telephone companies commit to exceeding the build-out requirements applicable to ordinary licensees. Order, para. 244. This "preference" in fact accords no preference at all. This "preference" will hardly assist rural telephone companies in attracting additional capital to finance their auction bids. Committing additional capital to network build-out will have the effect of reducing the amount of capital available to bid at auction, thus eliminating any effect a bidding credit might otherwise have. The Commission only adds insult to injury by proposing to exact a penalty for inability to meet a rural telephone company's build-out requirement. Order, para. 244. This provision is especially egregious when applied to capital-intensive services licensed over large geographic areas, e.g. broadband PCS.

The basis upon which the Commission seeks to distinguish rural telephone companies from other small businesses is unclear in this

regard. All designated entities are equally disadvantaged when compared with the "deep pocket" players. The public at large is disserved when such entities are able to monopolize access to the spectrum and the results are contrary to express Congressional directives to avoid implementation schemes which result in aggregation of control over the spectrum. Consequently, USIN submits that bidding credits of at least 50% should be available to rural telephone companies, other designated entities, and consortia they control in order to effectively compete against "deep pocket" auction participants.

**B. The FCC Should Make the Preferences Available to Small Businesses Available to All Small Businesses, Including Small Rural Telephone Companies.**

USIN submits that the FCC's Order is further suspect because it proposes to define what a "small" rural telephone company is, yet requires rural telephone companies to demonstrate that they are "small" under a separate definition in order to qualify for preferences available to "small" entities, one which may preclude them from obtaining preferences directed toward such smaller entities.

The FCC notes that the provisions of the House Report seek to "ensure that all small businesses will be covered by the Commission's regulations," Order, para. 236, quoting H.R. Rep. 103-111, at 255. Given that the FCC acknowledges that the House Report includes direction to include "all small businesses," and



the FCC's adoption of a requirement that rural telephone companies also be "small," the FCC should provide that preferences designed to compensate for relatively small size, and lack of available capital, are available to small rural telephone companies as well, without requiring an additional showing. Specifically, this legislative history supports reconsideration of the decision to include rural telephone companies in the group eligible for installment payments, without requiring rural telephone companies to further prove that they are "small."

USIN further notes that adoption of a restrictive net worth test (\$6 million net worth, \$2 million in after-tax annual profits) for the definition of a "small business," Order, para. 271, improperly discriminates against small rural telephone companies which may have high levels of non-amortized assets, yet only have available capital (in terms of net annual revenues) comparable to, or even lower than, other small businesses. Instead, USIN submits that, for capital-intensive services, the appropriate measure for "small" telephone companies (and other small businesses) is generally that which has already been recognized by the Commission -- those with annual revenues of less than \$100 million.

In particular, USIN submits that small telephone companies should be permitted, like other small businesses, to submit their winning bids in installment payments over the license period. Small telephone companies do not have the capital resources to bid

for broad geographic areas absent the opportunity to amortize payments over the ten-year license period. While financial institutions traditionally open to small telephone companies have indicated that financing may be available for construction costs, there is no indication whatsoever that the auction price itself is subject to the same consideration. Failure to recognize this reality will discourage designated entity participation in the provision of PCS, to the detriment of the public interest as articulated by Congress.

USIN submits that Congress clearly intended that rural telephone companies should receive preferences not only because of the role rural telcos play in providing prompt delivery of service to rural areas, but also because they represent "small" telecommunications providers which do not possess the access to capital and/or internal revenue streams of larger providers, and therefore may be disadvantaged in competitive bidding. Cf. Order, para. 281, citing Comments of OPASTCO, p. 5.

The very purpose for including preferential treatment for designated entities in the competitive bidding authority was to preclude auctions from favoring large incumbent telecommunications providers, and excluding companies who lack the capital to immediately spawn new businesses. See, e.g., Order, para. 230; NPRM, para. 72; H.R. Rep. No. 103-111 at 255. If the competitive bidding rules are to permit small companies to grow, the FCC must

not allow deep-pocket players to kill off new seedlings at the initial licensing stage. In this respect, small rural telephone companies seeking to enter growth markets should not be treated differently from other small businesses for purposes of spectrum auctions for new services.

USIN notes that the statutory passages cited by the Commission as support for its goal of ensuring participation by designated entities do not differentiate between the entities, and that the Order lists rural telephone companies as a member of the designated entity class, and states that its preferences "will allow designated entities to overcome barriers that have impeded these groups' participation in the telecommunications arena, including barriers related to access to capital." Order, para. 230. USIN requests reconsideration with respect to the Order's treatment of rural telephone companies in order that the Commission may achieve its stated goals of providing meaningful participation to designated entities through an appropriately inclusive definition of "rural telephone companies" and allowing the participation of these entities through economically-viable vehicles.

#### **IV. The FCC Should Retain the Option of Spectrum Set-Asides for Certain Services.**

USIN maintains its belief that, for certain services where bidding is expected to be highly competitive, and could result in excessive concentration among larger entities, Congressional intent would best be met through the auction of specific spectrum blocks

limited to designated entity participation. See, Order, paras. 245-247. Only through this reservation can the Commission ensure the implementation of clear Congressional intent that designated entities participate in the provision of spectrum services, even where competitive bidding for licenses is expected to be highly competitive and capital-intensive. See 47 U.S.C. 309(j)(3)(B); 309(j)(4)(D). While this mechanism may be better suited to certain services than to others, elimination of this methodology from consideration altogether would be premature, unnecessary and unwise.

USIN agrees with the Commission that while Congress elected not to require the FCC to exempt rural telephone companies from auctions entirely or award rural telephone companies licenses directly, Congress did not prohibit the use of separate auctions for smaller entities only, including small businesses, rural telephone companies and small businesses owned by minorities and women. See Order, para. 247; see also 47 U.S.C. § 309(j)(4)(D) (Commission may use tax certificates, bidding preferences, and other procedures); H.R. Rep. 103-111 at 257 (Committee rejected a "mandate" to issue licenses to rural telephone companies).

USIN submits that, to the extent that this mechanism is narrowly focused on precluding excessive concentration and is based on economic characteristics alone, see Order at para. 236 (installment payments intended for only those with small economic

status), objections to such a mechanism based on the equal protection guarantees of the U.S. Constitution are speculative at best. See, e.g., F.C.C. v. Beach Communications, Inc., 113 S. Ct. 2096, 2101 (1993) (a classification that neither proceeds along suspect lines nor infringes on a fundamental right must be upheld if there is a rational basis for the classification). Consequently, the Commission should expressly retain the option of introducing spectrum-specific bidding eligibility limitations as one of the tools through which it will implement Congressional intent.

#### **CONCLUSION**

The Order warrants reconsideration in several respects in order to provide for meaningful participation by small businesses, including small rural telephone companies. USIN recognizes the tremendous effort and careful thought that FCC staff have put into the competitive bidding proceeding, and welcomes further careful thought to ensure that competitive bidding rules effectively promote the articulated Congressional and Commission goals.

Accordingly, USIN requests that (1) preference eligibility be extended to consortia controlled by eligible entities; and (2) the definition of "rural telephone company" be modified to exclude only the top 29 telephone companies by providing that companies serving fewer than 100,000 access lines or those with gross annual revenues of less than \$100,000,000 are eligible for preferred treatment; and

(3) rural telephone companies should be afforded equitable treatment with respect to the availability of preferences.

Adoption of these modifications will ensure that the Commission has responded to both Congressional directives and the public interest.

Respectfully submitted,

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Certificate of Service

I, Charles D. Cosson, hereby certify that copies of the foregoing Petition for Reconsideration of U.S. Intelco Networks, Inc. were served on the 3rd day of June, by first class, U.S. mail, postage prepaid, to the following:

  
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